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October 13, 1999

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VIA HAND DELIVERY

Ms. Magalie R. Salas
Secretary
Federal Communications Commission
The Portals
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Washington, D.C. 20554

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OCT 13 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

RE: Comments of Metro One Telecommunications, Inc. in CC Docket No. 99-273:
In the Matter of Provision of Directory Listing Information under the
Telecommunications Act of 1934, As Amended: Notice of Proposed Rulemaking

Dear Ms. Salas:

On behalf of Metro One Telecommunications, Inc. ("Metro One"), we submit herewith for filing an original and four (4) copies of Comments in the above-referenced proceeding.

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PAUL, HASTINGS, JANOFSKY & WALKER LLP

Ms. Magalie R. Salas

October 13, 1999

Page 2

We also enclose an extra copy of this transmittal letter that is to be date-stamped and returned in the envelope provided. Should any questions arise regarding this submission, please contact Metro One's undersigned legal counsel.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michelle W. Cohen". The signature is fluid and cursive, with the first name "Michelle" being more prominent than the last name "Cohen".

Michelle W. Cohen

for PAUL, HASTINGS, JANOFSKY & WALKER LLP

Enclosures

cc: Judy Boley, Federal Communications Commission (w/encl.)
Virginia Huth, Office of Management and Budget (w/encl.)
Al McCloud, Federal Communications Commission, Common Carrier Bureau
(w/diskette only)
International Transcription Services, Inc. (w/encl. and diskette)

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

Provision of Directory Listing Information
under the Telecommunications Act of 1934,
As Amended

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)
)
)
)

CC Docket No. 99-273

COMMENTS OF METRO ONE TELECOMMUNICATIONS, INC.

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October 13, 1999

Metro One Telecommunications, Inc.
October 13, 1999

SUMMARY

Metro One Telecommunications, Inc. (“Metro One”) supports the Commission’s efforts to promote competition in the directory assistance (“DA”) market. As the *Notice of Proposed Rulemaking* recognizes, DA providers play a critical role in ensuring that consumers reap the benefits of competition that Congress envisioned in enacting the Telecommunications Act of 1996 (the “1996 Act”). The Commission must ensure that alternative directory publishers, including DA providers and Internet directory publishers, have access to local exchange carriers’ (“LECs”) subscriber list information (“SLI”) on a timely and unbundled basis, under nondiscriminatory and reasonable rates, terms and conditions pursuant to Sections 222(e) and 251(b)(3) of the 1996 Act.

The statutory language of Section 222(e), and the legislative history and goals of the 1996 Act demonstrate that Congress intended to encourage a vibrant, competitive directory market consisting of various “directory alternatives,” including any services that might develop after enactment of the 1996 Act. Congress specified that Section 222(e) applies to directories “in any format,” thereby denoting that regardless of the form, any type of “published” directory is meant to be a beneficiary of Section 222(e)’s obligations, including DA and Internet directories. A DA operator clearly “publishes” its SLI by divulging that information to callers. Thus, DA providers must be entitled to SLI pursuant to Section 222(e).

ILECs remain the dominant providers of directory publishing, including DA. If DA providers and others are to compete on an even playing field with ILECs, the rates charged by LECs for SLI should be no greater than the LECs’ incremental costs. Thus, Metro One urges the Commission to reevaluate LEC SLI rates. Rates for SLI should vary among LECs only if the costs to produce the listings vary. Based upon state utility commission precedent and Metro One’s industry knowledge, the true

costs to produce directory listings are considerably less than the rates the Commission recently suggested as benchmarks. In addition, the Commission should require ILECs offering national or nonlocal DA using their subscribers' listings to provide those listings to requesting DA providers at the same rates, terms and conditions that the ILECs offers themselves and their affiliates.

Finally, the Commission should permit all DA providers access to SLI, irrespective of whether such providers offer telephone exchange service or telephone toll service. There are several bases upon which the Commission can take this action, including treating DA providers as agents of CLECs that are entitled to directory listings under Section 251(b)(3) of the Communications Act. In addition, many DA providers, including Metro One, provide a call completion service to end-users. Since call completion service necessarily involves a telephone toll or exchange component, such providers satisfy Section 222(e)'s requirement.

As Metro One's Comments demonstrate, DA providers are filling a critical need for CLECs, many of whom do not have the resources to build and staff call centers and acquire their own DA listings. Thus, by mandating SLI access on reasonable and nondiscriminatory rates, terms, and conditions for *all* DA providers, the Commission will be fostering competition in DA services and in the larger telecommunications market as well.

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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Provision of Directory Listing Information)	
under the Telecommunications Act of 1934,)	CC Docket No. 99-273
As Amended)	

COMMENTS OF METRO ONE TELECOMMUNICATIONS, INC.

Metro One Telecommunications, Inc. ("Metro One"), by its attorneys, and pursuant to Sections 1.415 and 1.419 of the Federal Communications Commission's (the "Commission") Rules, hereby respectfully submits these Comments on the *Notice of Proposed Rulemaking* (the "*Notice*") adopted in the captioned proceeding.^{1/}

I. INTRODUCTION AND BACKGROUND

Metro One is a national provider of enhanced information and telecommunications services. It is certified to provide directory assistance ("DA") and toll services in Oregon, has been assigned a Carrier Identification Code and has obtained an Operating Company Number from the National Exchange Carrier Association. Metro One's services currently include the provision of Enhanced Directory Assistance ("EDA"), with live operator-assisted call completion to end-users of various national and regional cellular and personal communications services ("PCS") telecommunications companies. Metro One also offers its services to landline-based carriers, including competitive local exchange carriers ("CLECs"). Metro One's EDA

^{1/} See *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Third Report and Order* in CC Docket No. 96-115; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Second Order on Reconsideration* in CC Docket No. 96-98; *Provision of Directory Listing Information under the Telecommunications Act of 1934, As Amended, Notice of Proposed Rulemaking* in CC Docket No. 99-273 (rel. Sept. 9, 1999).

services enable end-users to obtain "traditional" DA services (*i.e.*, telephone numbers of individuals and entities), as well as a host of enhanced services such as movie listings, information on local events (*e.g.*, concerts and sporting events), geographic directions, weather warnings and school closings.

Metro One is headquartered in Beaverton, Oregon and has 23 DA call centers located throughout the United States. Metro One has built multiple call centers to better serve its customers with operators who can provide in-depth knowledge of local and regional information. One or more of Metro One's DA call centers are located in each of the Regional Bell Operating Company ("RBOC") service areas.

Metro One and other competitive DA providers offer end-users and competitive carriers an alternative to the incumbent local exchange carriers' ("ILEC") DA services. Competitive DA providers focus on customer service and attractive pricing and have competed with the ILECs by developing innovative features and services. Such innovative services created by a competitive DA provider include: National Directory Assistance ("NDA") provided through a single number; enhanced information services; the ability to automatically be returned to an operator in the event that you are connected to a busy ring or if there is no answer; and the ability to obtain driving directions from a DA operator. Alternative DA providers have stimulated competition from ILECs in the DA market. For instance, many of the RBOCs, responding to competition in the DA market, have recently replicated DA improvements, such as NDA and EDA services.^{2/}

However, alternative DA providers have faced, and continue to encounter, an uphill battle against the ILECs to obtain subscriber list information ("SLI") on

^{2/} See, *e.g.*, Letter from Gerard L. Waldron, Counsel for INFONXX, to Magalie Roman Salas, Secretary, FCC, at 5-6 (filed March 18, 1999) ("INFONXX March 18, 1999 Letter").

nondiscriminatory terms and conditions. The Commission has recognized that, as the dominant providers of local exchange services, and thereby the chief repositories of SLI, ILECs have a unique advantage in the DA business because they have the *only* complete and reliable DA databases. Third party DA data is highly inferior and cannot be relied upon if a provider is to remain competitive.^{3/}

Recognizing that the ILECs' monopoly power in SLI would impede the Telecommunications Act of 1996's (the "1996 Act") goal of full and fair competition in all markets, Congress passed Section 222(e) of the 1996 Act.^{4/} Section 222(e) of the 1996 Act was designed to ensure access to SLI on nondiscriminatory terms and conditions by entities that publish directories "in any format," including Internet directories and DA.

3/ See *Petition of U S WEST Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance, Memorandum Opinion and Order*, CC Docket No. 97-172, ¶ 35 (rel. Sept. 27, 1999) (the "*National Directory Assistance Order*") ("[t]he competitive advantages U S WEST enjoys with respect to the provision of directory assistance service throughout its region stem from its dominant position in the local exchange and exchange access markets.") See also Letter from Gerard L. Waldron, Counsel for INFONXX, to Magalie Roman Salas, Secretary, FCC, at 4 (filed May 20, 1999) ("INFONXX May 20, 1999 Letter") ("U S WEST has access to fully accurate subscriber information as a result of the fact that it is the dominant LEC in its region"); see also INFONXX March 18, 1999 Letter at 5, 7 (stating that ILECs "have always enjoyed an unfair advantage due to their monopoly position in the local exchange [market]," and noting that the ILECs enjoy a cost advantage of over 60 percent per call). INFONXX also established that database inaccuracies due to inferior access to SLI result in approximately 40 million wrong telephone numbers per year.

4/ See, e.g., Letter from Gerard L. Waldron, Counsel for INFONXX, to Magalie Roman Salas, Secretary, FCC, at 1 (filed June 29, 1999) ("INFONXX June 29, 1999 Letter") ("Over the last decade both segments of directory publishing – printed directories and audio directory assistance – have witnessed the introduction of competition, but both have been and continue to be hampered by Incumbent Local Exchange Carrier (ILEC) charges and practices designed to prevent competitors from gaining equal access to the subscriber listing information obtained by the I-LEC by virtue of its monopoly position.").

II. DISCUSSION

A. The Statutory Language, Legislative History and Policies of the 1996 Act and Section 222(e) in Particular Demonstrate that Section 222(e) Encompasses *all* Directory Publishers

In the *Notice*, the Commission seeks comment on whether the phrase “in any format” indicates Congress’s intent not to restrict the kinds of directories that could be published using SLI obtained pursuant to Section 222(e).^{5/} Congress’s mandate in Section 222(e) requires telephone exchange service providers to provide SLI “to *any* person, upon request, for the purpose of publishing directories *in any format*.” Thus, Congress clearly intended that directories covered by Section 222(e) were not limited to the traditional printed white and yellow pages. Had Congress intended such an outcome, it could have specified “persons who publish printed directories,”^{6/} or some other similar phrase. Rather, the flexible standard in Section 222(e) covers directory publishers, Internet directory providers and competitive DA providers as they are all clearly “persons” who “publish directories.”

In reviewing Section 222(e), the Commission must “construe a statutory term in accordance with its ordinary or natural meaning.”^{7/} Here, the Commission needs only to focus on Section 222(e)’s statutory language, which mandates that regardless of the form, any type of published directory is meant to be a beneficiary of Section 222(e)’s obligations. Section 222(e)’s application to those who publish directories is not limited to printed materials. Rather, “publish” has several meanings

^{5/} See *Notice*, ¶ 173.

^{6/} INFONXX June 29, 1999 Letter at 3. Indeed, Commissioner Furchtgott-Roth “cannot believe that a reference to publishing ‘in any format’ should be limited to the printing of subscriber list information on paper.” See Separate Statement of Commissioner Furchtgott-Roth Dissenting In Part, CC Docket Nos. 96-115, 96-98 and 99-273, at 4 (“Commissioner Furchtgott-Roth Statement”).

^{7/} *FDIC v. Meyer*, 510 U.S. 471, 476 (1994).

that do not require the creation of formal printed documents. *Webster's New World Dictionary* defines "publish" as "to make publicly known; announce, proclaim, divulge or promulgate."^{8/} *Black's Law Dictionary* states that to "publish" information is "to utter" it.^{9/} The United States Supreme Court, in *Gertz v. Welch*,^{10/} held that both a newspaper (in print) and a broadcaster (in oral form) can commit libel by "publish[ing] defamatory falsehoods about an individual."

The term "directory" also encompasses a variety of listings. *Merriam-Webster Collegiate Dictionary* defines the word "directory" as "an alphabetical or classified list (as of names and addresses)."^{11/} In addition, the mere fact that Congress utilized the word "any" denotes Congress's intention to include *every* directory.^{12/} Thus, every directory publisher must be afforded access to the LECs' SLI under the terms and conditions set forth in Section 222(e).

In addition to being contrary to the clear statutory language, failing to interpret Section 222(e) as encompassing Internet directories and the oral dissemination of listing information by a DA provider would be inconsistent with the legislative history and the policies of the 1996 Act. The Congressional floor statements and committee reports concerning Section 222(e) demonstrate that Congress meant to encourage a vibrant, competitive directory market by mandating that entities offering

^{8/} *Webster's New World Dictionary* 1087 (3d coll. ed. 1988).

^{9/} *Black's Law Dictionary* 1233 (6th ed. 1990).

^{10/} 418 U.S. 323, 332 (1974).

^{11/} *Merriam-Webster Collegiate Dictionary* 328 (10th ed. 1993).

^{12/} See *Merriam-Webster Internet Directory* at www.m-h.com, which defines "any," as "one or some indiscriminately of whatever kind" and "every."

“directory alternatives” have access to the ILECs’ SLI.^{13/} Congress recognized that, while the directory publishing market was somewhat competitive, ILECs were using discriminatory pricing and other measures to limit that competition. For instance, Congressman Paxon explained that Section 222(e) is a “simple requirement to protect an area of telecommunications where there has been competition . . . but where service providers have used pricing and other terms to try to limit that competition.”^{14/}

One of the central goals of the 1996 Act is to “accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition.”^{15/} In light of this Congressional purpose, in crafting Section 222(e), Congress intended that Section 222(e)’s mandate be extended to an open-ended class of directory publishers. Metro One concurs with other participants in this proceeding that “[w]hile the directories most often used by customers in 1996 were in printed form, Congress chose broad language so as not to lock in any particular technology or format. To limit this phrase to directories only in a printed format would defy the Act’s pro-competitive and forward-looking perspective.”^{16/}

^{13/} See 142 Cong. Rec. H1160 (daily ed. Feb. 1, 1996) (statement of Rep. Barton) (noting that exclusive LEC control of SLI “deprives[s] consumers and advertisers of cheaper, more innovative, more helpful *directory alternatives*”) (emphases added).

^{14/} 142 Cong. Rec. E184 (daily ed. Feb. 6, 1996) (Statement of Rep. Paxon).

^{15/} S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 113 (1996) (Joint Explanatory Statement of the Committee of Commerce).

^{16/} INFONXX June 29, 1999 Letter at 2-3.

B. Internet Directories

1. *Section 222(e) Entitles Publishers to Obtain Subscriber List Information “for the Publication of Directories in any Format,” Including Internet Directories*

In the *Notice*, the Commission seeks comment on issues relating to the development of Internet directories, including whether Section 222(e) of the Communications Act of 1934, as amended (the “Communications Act”) entitles directory publishers to obtain SLI for use in Internet databases.^{17/} Metro One believes that, by the use of the term “in any format,” Congress intended Section 222(e) to encompass a wide variety of directories. The statutory language of Section 222(e) is unmistakable: irrespective of the configuration by which an entity assembles and publishes directories, the entity is entitled to obtain SLI from local exchange carriers (“LECs”), “on a timely and unbundled basis, under nondiscriminatory and reasonable rates, terms and conditions.”

Metro One concurs with Commissioner Susan Ness’s Separate Statement in this proceeding that “the statutory language is clear on this point -- ‘in any format’ necessarily includes directories published in an electronic format.”^{18/} Moreover, as Commissioner Furchtgott-Roth stated, “an entity that ‘discloses’ [SLI] on an Internet site would clearly be engaging in activity that the dictionary would call ‘publishing.’”^{19/} It would be arbitrary and directly in contravention of the clear statutory language and

^{17/} *Notice*, ¶ 173.

^{18/} See Separate Statement of Commissioner Susan Ness, CC Docket Nos. 96-115, 96-98, and 99-273, *Third Report and Order, Second Order on Reconsideration and Notice of Proposed Rulemaking*, rel. Sept. 9, 1999, at 1 (“Commissioner Ness Statement”) (citing *Reno v. ACLU*, 521 U.S. 844 (1997) as stating that “any person or organization with a computer connected to the internet can ‘publish information’”).

^{19/} See Commissioner Furchtgott-Roth Statement at 4 (referencing *Webster’s Third New International Dictionary* definition of “publish”).

intent if the Commission were to conclude that Internet directories are not covered by Section 222(e).

The Internet has developed beyond what anyone, even Congress, could have conceived over three and one half years ago. Internet directories are quickly becoming the first choice directory for many consumers. ILECs, including the RBOCs, have quickly entered, and seek to dominate, the Internet directory market. As noted by Commissioner Ness, at least one RBOC (BellSouth) actually markets its Internet SLI database as "The *Real* White Pages."^{20/} The Internet has become in reality the "Directory of Directories." As indicated in Paragraphs 174 and 175 of the *Notice*, publishers of paper telephone directories were some of the first and are currently among the largest providers of Internet directories. These directories include Bell Atlantic's bigyellow.com, GTE's superpages.com, U S WEST's uswestdex.com, BellSouth's realpages.com, SBC's and Pacific Bell's smartpages.com. All of these "Internet directories" provide, at a minimum, the telephone number and address of businesses when searched by the name or classification of the business.

Presumably, the source for the name, address and telephone information for these Internet "directories" came from the directory listing database of the respective directory publishing entity, *i.e.* the ILEC. Such a use of the listings could be reasonable and appropriate, but only if competitive providers of Internet directories are given nondiscriminatory access to the SLI of the LECs so they themselves can provide an Internet directory that is competitive with the LECs. Thus, in order to become competitive with LECs' Internet SLI databases, other independent Internet publishers must have access to the ILECs' SLI pursuant to Section 222(e).

^{20/} See Commissioner Ness Statement at 1 (citing <http://yp.bellsouth.com>).

2. *LECs may not Place Unreasonable Restrictions on How Third Parties May Access and Use Internet Directories*

The *Notice* seeks comment on whether carriers that provide SLI pursuant to Section 222(e) may restrict how third parties access and use Internet directories containing that information.^{18/} A LEC which provides SLI for use in Internet directories and places unreasonable restrictions on how third parties may access and use Internet directories containing the information is acting inconsistently with the duties of Section 222(e). Metro One believes that any restrictions imposed by the LECs which are more restrictive than the LECs impose on their own Internet directory or any other Internet directory for which they provide their listings would be unreasonable and discriminatory in contravention of Sections 222(e) and 202(a) of the Communications Act and an “unjust practice” under Section 201(b).^{19/}

C. Oral Provisioning of Listing Information

1. *Directory Assistance Providers are “Publishing Directories” under Section 222(e)*

The *Notice* seeks comment on whether Section 222(e) encompasses the oral publication of listing information by a DA provider.^{20/} Metro One believes that DA service is a form of directory covered by Section 222(e). As Commissioner Furchtgott-Roth recognizes, “an operator orally ‘making known’ subscriber list information to a requesting party over the telephone . . . would clearly be engaging in activity that the

^{18/} *Notice*, ¶ 177.

^{19/} However, Metro One recognizes that some restrictions may be necessary to prevent massive downloading from Internet directories’ websites of entire listings databases for use in providing services other than directory publishing, which action would in itself be inconsistent with Section 222(e).

^{20/} *Notice*, ¶ 180.

dictionary would call ‘publishing.’”^{21/}

There are several similarities to DA service, printed directories, and Internet directories. All three products serve the basic purpose of providing telephone numbers, addresses and names of people and businesses. The most crucial similarity is that all three are dependent on being able to obtain the LECs’ SLI. The basic difference in the three services is the manner of delivery of the information requested. Paper directories require the user to access the paper directory, and Internet directories require the user to access a web site and search for the desired information. DA, as the name implies, involves a live operator who “assists” the user in finding the desired information. However, in light of the fact that “technological advances have blurred the distinction between directory publishing . . . and directory assistance,”^{22/} these different methods of delivery are simply different means of “publishing” the relevant directory, and should all be entitled to the protections of Section 222(e).

The Commission asks commenters to address whether interpreting Section 222(e) as encompassing the oral dissemination of listing information by a DA provider would be consistent with the legislative history, the broader statutory scheme, and the policy objectives of the 1996 Act.^{23/} As set forth in more detail in Section II A.1 above, publishing can occur orally as well as in written form. Therefore, the plain reading of the statute leads to the conclusion that all publishers of directories, including DA providers, must have access to SLI under Section 222(e).

In addition, in deeming Section 222(e) to cover oral dissemination of listing information by DA providers, the Commission would be furthering the broader

^{21/} Commissioner Furchtgott-Roth Statement at 4.

^{22/} Notice, ¶ 180.

^{23/} *Id.*

Congressional goals of the 1996 Act to open *all* telecommunications markets to full and fair competition, so that providers may compete on an even playing field. The Commission recognizes that “directory assistance providers play an increasingly important role in ensuring that consumers receive the benefits of competition in all telecommunications-related services.”^{24/} The growth in competitive DA combined with the decline in growth of most LEC printed directories demonstrates that users substitute DA for printed directories. However, competitive DA providers cannot continue to offer the new, innovative services consumers have demonstrated they want in competition with the LECs without full, nondiscriminatory access to LECs’ SLI pursuant to Section 222(e).

2. *Directory Assistance Providers are Entitled to the Same Rates, Terms and Conditions for Subscriber List Information as the LEC Charges Itself*

Section 222(e) requires that LECs’ rates for SLI are to be reasonable and nondiscriminatory. Metro One believes that DA providers should be subject to the same nondiscriminatory access as other directory publishers, and that the rates in all instances should not exceed the incremental costs of providing the directory listings plus a reasonable allocation of common costs and overhead.

There is no justification for allowing LECs to charge DA providers and others more than their incremental costs plus a reasonable allocation of common costs and overhead for directory listings. In fact, such an action would be directly contrary to Congressional intent. During the hearings on the 1996 Act, Congressman Paxon specifically sought to ensure that “in determining what constitutes a reasonable rate. . . the most significant factor should be the incremental cost of delivering that listing to

^{24/} Notice, ¶ 183.

the requesting party.”^{25/} Since the sources and processes the LECs use to create the SLI are in most cases very similar, if not identical, the costs should not vary significantly between LECs. Also, the costs to produce any given set of listings should not vary based on how they are to be used. Therefore, if a competitive directory provider wants to use one set of listings purchased from a LEC to produce a printed directory, an Internet directory and DA, the price charged by the LEC to the provider should be the same as if the provider were only going to produce one of the directories. Moreover, if the competitive directory provider acquires only one set of listings and updates to be used in several different products, the LEC has only incurred the costs to produce one set of listings and updates.

A LEC should be permitted to charge different rates for listings used in DA, printed directories and Internet directories only if the cost to produce the listings is different. For instance, it is reasonable and expected that costs on a per-listing basis to produce listings for a DA provider who requires all of the listings of a LEC and requires that they be updated every day might be less than for a directory publisher who needs a base load of listings once a year and updates on a less frequent basis, irregular basis.

In the *Third Report and Order* in this proceeding, the Commission determined what it deems presumptively reasonable rates for SLI — \$ 0.04 per listing for subscriber listings and \$ 0.06 for updates of such listings. The Commission did not mandate these rates, but warned carriers to be prepared to justify higher rates if a directory publisher files a complaint.^{26/}

^{25/}142 Cong. Rec. E184.

^{26/} Notice, ¶¶ 72-73.

Metro One believes that the Commission's presumptively reasonable rates are inaccurate. Metro One and other competitive providers know from extensive experience in state regulatory proceedings how difficult it is to get meaningful, credible and verifiable listing cost information from the LECs. However, the cost data Metro One has been able to obtain and decisions of the state utility commissions that have analyzed LEC DA listing cost studies, indicate that the true costs to produce directory listings are considerably less than the LECs are attempting to charge in other states and substantially less than the \$0.04 and \$0.06 that the Commission presumes reasonable for subscriber listings under Section 222(e).^{27/}

The *Notice* asks whether the Commission should preclude state regulation that requires or permits differing rates, terms and conditions for SLI that will be published orally than those for SLI that will be published in other formats.^{28/} The Commission should preclude state regulation that permits rates that are higher than that prescribed by the Commission and terms or conditions that are more restrictive to competitive providers than the Commission's rules allow. However, the states should have the flexibility to allow lower rates and permit terms and conditions that are more pro-competitive if the states deem such actions to be necessary to promote competition, to protect consumers, or otherwise.

^{27/} See e.g., Docket No. 19075, Public Utility Commission of Texas, MCI-SBC Arbitration, August 13, 1998 (ordering rates of \$11,500 for initial load of listings and \$0.0014 per listing for updates provided in electronic format); see also New York Public Service Commission order Dockets 94-C-0095, 95-C-0657, 91-C-1174, 96-C-0036, Phase 3 Opinion and Order 99-4, February 22, 1999 (ordering rates for listings used in DA of \$0.0044 per listing for initial listings and \$0.0077 per listing for updated listings). In a proceeding before the Florida Public Service Commission, No. 931138-TL, P.O.D. # 3, Page 2, July 23, 1996, BellSouth Telecommunications filed the results of a cost study stating its costs to produce DA listing of \$0.001 per listing for the base file and \$11.81 per Central office file per month for update listings.

^{28/} *Notice*, ¶ 181.

**3. *Section 251(b)(3) Clearly Requires that LECs Must Provide
Directory Assistance Listings to Requesting Carriers at the Same
Rates, Terms and Conditions that LECs Provide to Themselves***

The *Notice* seeks comment on whether LECs must provide DA to requesting carriers at the same rates, terms and conditions that the LECs provide to themselves.^{29/} For competitive providers to be able to compete with the LECs they must be able to acquire the listings under all of the same terms and conditions that LECs provide to themselves and their affiliates, including the rates that LECs charge themselves and their affiliates.

LECs do not own the directory information. The telephone subscriber who provided the information owns the information. LECs easily, and with minimal costs, obtain the DA listing information of their customers by virtue of being their LEC. The information of name, address and main business heading is willingly provided by most of the LECs' telephone customers so they can get service established, have their listings published in the printed directory and be available when callers seek their numbers through DA. As a matter of fact, the telephone subscriber is even charged by the LEC, in the form of a service connection charge, to establish that listing record. This service connection charge is levied to cover the cost of establishing telephone service, including creating the directory listing.

Allowing the LEC, or any entity assigning a telephone number and collecting the associated directory assistance information, to make a profit over and above their costs of providing a service is anti-competitive and contrary to the intent of Section 251(b)(3). The clear intent of the 1996 Act was to promote a pro-competitive environment in all aspects of the telecommunications industry. CLECs and other DA providers and directory publishers are attempting to provide competition to the

^{29/} *Notice*, ¶ 187.

established, entrenched LECs by providing more innovative and enhanced services at lower prices.^{30/} The Commission has recognized that “[t]hese directory assistance providers play an increasingly important role in ensuring that consumers receive the benefits of competition in all telecommunications-related services.”^{31/}

DA providers are concerned that they receive access to directory listings under the same nondiscriminatory terms and conditions as other alternative providers. However, they are more concerned that they be able to gain access under the same rates, terms and conditions that the LECs provide to themselves. This is critical because the LECs have been and still are the dominant providers of DA, and retain the highest market share of the DA market.

Nondiscriminatory access for DA providers also requires nondiscriminatory access to the primary advertising classifications of the listings of the LECs under either Section 222(e) or Section 251(b)(3), or both. Section 222(f)(3) defines SLI as “the listed names of subscribers of a carrier and such subscribers’ telephone numbers, addresses, *or primary advertising classifications (as such classifications are assigned at the time of the establishment of such service)* or any combination of such listed names, numbers, addresses, or classifications . . . that the carrier or an affiliate has published, caused to be published, or accepted for publication in any directory format.”^{32/} In the provision of DA service, the availability of “primary advertising classifications” is necessary to satisfy many customer requests. Most DA requests are for businesses. DA customers frequently do not know the precise name of the business they are

^{30/} See, e.g., Notice, ¶ 183 (“[I]ndividual business and residential customers may wish to contract with an independent provider of directory assistance service to avail themselves of services that might not be available through their LECs.”).

^{31/} *Id.*

^{32/} 47 U.S.C. § 222(f)(3) (emphases added).

seeking, but know the type of business. Having the primary advertising classification available to assist in the search increases the probability of a successful search considerably. Some LECs currently provide a version of the primary advertising classification with their DA listings. Others do not. Presumably some, if not all, LECs use the primary advertising classification in the provision of their DA. If the LEC uses a "primary advertising classification" or something similar, this information also must be provided to competitive DA providers under Section 251(b)(3) and/or Section 222(e).

Finally, competing DA providers should be entitled to file complaints under Section 208 of the Communications Act and have these complaints adjudicated regarding compliance with Section 251(b)(3). As with compliance with Section 222(e), the LEC should have the burden of establishing the costs of its listings. The rates charged to competitive providers should not exceed those costs.

4. All Competing Directory Assistance Providers, Whether or Not They Provide Telephone Exchange Services or Telephone Toll Services, Should Be Entitled to Nondiscriminatory Access to the LEC Directory Assistance Databases

The Commission recognizes that DA providers are increasing competition in the DA and the larger telecommunications marketplace. The Commission tentatively concludes that the presence of competitive DA providers "benefits competition," and that the Commission "should encourage such competition in the provision of directory assistance, whether or not the particular directory assistance provider also provides telephone exchange service or telephone toll service."^{33/} Metro One concurs with this conclusion and urges the Commission to interpret Section 251(b)(3) or Section 222(e), or both, in a manner that furthers the pro-competitive goals of the 1996 Act by assuring

^{33/} Notice, ¶ 183.

that all competitive providers have access to the LECs' SLI on reasonable and nondiscriminatory rates, terms and conditions.

a. ***Competitive Directory Assistance Providers are CLEC Agents and Should be Entitled to Access under Section 251(b)(3)***

Metro One and other competitive DA providers offer end-users and competitive carriers a critical alternative to the ILECs' DA services. The Commission has recognized that "customer perception can be shaped by perceived disparities in the quality of access to [DA] services provided by a competing carrier and an incumbent LEC."^{34/} Since the passage of the 1996 Act, few, if any, of the new entrant CLECs have established their own DA capability. Despite what the LECs have contended in this and other proceedings, the costs and difficulties of building call centers, buying computers and systems, staffing the call centers and acquiring acceptable quality DA listings cause insurmountable barriers to entering the DA provider business. Most new entrant CLECs have no choice but to outsource their DA to the LECs or to a third party DA provider.

The *Notice* seeks comment on whether a non-carrier DA provider is entitled to nondiscriminatory access to DA under Section 251(b)(3) when that provider is an agent of a LEC or other carrier that qualifies for the benefits of Section 251(b)(3).^{35/} As described above, most CLECs and other competitive carriers rely on their DA "agents" to provide all aspects of DA service, including acquiring the DA listings from the LECs. Therefore, it is inconsistent with the intent of the 1996 Act to deny CLECs

^{34/}*Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance, Notice of Proposed Rulemaking*, 13 FCC Rcd. 12817, 12858 (1998).

^{35/} *Notice*, ¶ 184.

the benefits of Section 251(b)(3) by not allowing the agent DA providers to acquire DA listings under the same rates, terms and conditions as the CLEC itself. DA providers have become the "directory assistance department" of the CLECs. In most, if not all, cases, these DA providers provide a more enhanced service at less cost than the LECs. They provide exactly the type of competition that the 1996 Act envisioned.

This position is directly supported by the common law of agency and Section 217 of the Communications Act. Section 217 states, "the act, omission, or failure of any officer, agent or other person acting for . . . any common carrier . . . shall in every case be also deemed to be the act, omission, or failure of the such carrier. . .".^{36/} The Commission has repeatedly stated that "the acts...of an agent or other person acting for a common carrier are deemed to be the acts...of the carrier itself."^{37/} Moreover, the Common Carrier Bureau previously found that Section 217 permitted an agent of carriers to file tariffs on the carriers' behalf.^{38/} Therefore, competitive DA providers, as CLECs' agents, should be able to provide DA service on the same terms, and subject to the same rights under the 1996 Act as the CLEC "principal."

b. *Section 251(b)(3) Should Apply to All Directory Assistance Providers, Particularly Those that Provide Call Completion Services*

The Commission seeks comment on whether Section 251(b)(3) authorizes the Commission to require the provision of nondiscriminatory access to DA providers

^{36/} 47 U.S.C. § 217.

^{37/} *Coleman Enterprises, Inc.*, 1999 FCC LEXIS 4035, ¶ 34 (rel. Aug. 13, 1999).

^{38/} See *Communique Telecommunications, Inc.*, 10 FCC Rcd. 10399 (Comm. Carr. Bur. 1995) (authorizing the National Exchange Carrier Association to file tariffs, and bill and collect universal service and other charges, as agent for its member local exchange carriers).

that do not themselves provide either telephone exchange service or telephone toll service.^{39/} The current development of the DA business provides ample evidence that the only practical means of meeting the objectives of Section 251(b)(3) and creating the competitive environment intended by the 1996 Act is to make the listings available to all competitive DA providers.

Some of these third party DA providers, including Metro One, also provide telephone exchange access or telephone toll service, and are authorized telecommunications carriers. Thus, such DA providers are entitled to the ILECs' directory listings under Section 251(b)(3). Other DA providers are not "carriers" in the traditional sense, but primarily provide DA service, with a call completion component. The Commission asks whether a DA provider becomes a provider of telephone exchange or telephone toll service under Section 251(b)(3) when it offers call completion services.^{40/} Metro One believes that competitive DA providers offering call completion service should be entitled to invoke Section 251(b)(3).

Competitive DA providers qualify as "telecommunications carriers." A "telecommunications carrier" is defined as "any provider of telecommunications services."^{41/} "Telecommunications service" is defined as the "offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."^{42/}

^{39/} Notice, ¶ 184. Section 251(b)(3) imposes on LECs "[t]he duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listings, with no unreasonable dialing delays." 47 U.S.C. § 251(b)(3).

^{40/} Notice, ¶ 185.

^{41/} 47 U.S.C. § 153(44).

^{42/} 47 U.S.C. § 153(46).

“Telecommunications” is defined as “the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.”^{43/} Metro One believes that a DA provider that is offering intraLATA or interLATA call completion is providing a “telecommunications service” and is therefore a “telecommunications carrier” as defined by the Communications Act. The call completion service involves aspects of telephone exchange service and/or telephone toll service. As such, the DA provider should be entitled to the directory listings under Section 251(b)(3).

5. *The Commission Should Require LECs to Provide Access to all Directory Assistance Providers Pursuant to Sections 201 and 202 of the Communications Act*

Metro One strongly agrees with the Commission's tentative conclusion that “non-carrier directory assistance providers cannot compete without access to directory assistance equal to that provided to providers of telephone exchange service and telephone toll service pursuant to Section 251(b)(3).”^{44/} LECs' refusals to provide DA listings, or to charge DA providers unreasonable rates for access to their DA listings are unjust and unreasonable charges and practices, violative of Section 201(b) of the Communications Act, and “unjust or unreasonable discrimination” in contravention of Section 202(a).

Moreover, a LEC that provides its DA to competing telecommunications carriers, or itself, under more favorable terms, conditions and rates than it charges non-carrier DA providers imposes unjust discrimination in charges and practices in violation of Section 202(a) and unreasonable discrimination under Section 202(a). Such

^{43/} 47 U.S.C. § 153(43).

^{44/} Notice, ¶ 190.

an action would give the carrier DA providers an unfair competitive advantage and would be unlawful under section 202(a).

D. LECs that are Providing National Directory Assistance Must Provide Nondiscriminatory Access to Nonlocal Directory Assistance Data Pursuant to Section 251(b)(3)

The Commission seeks comment on whether all LECs providing NDA must provide nondiscriminatory access to nonlocal DA data pursuant to Section 251(b)(3).^{45/} Metro One believes that mandating access to nonlocal DA data would further the policy underlying the *Local Competition Second Report and Order* which requires that ILECs provide competitors with access to the ILECs' networks sufficient to create a competitively neutral playing field for new entrants.

Specifically, in the *Local Competition Second Report and Order*, the Commission concluded that the term "nondiscriminatory access" as used in Section 251(b)(3) of the Communications Act means that a LEC that provides telephone numbers, operator services, DA, and/or directory listings must permit competing providers to have access to those services that: (a) does not discriminate between or among requesting carriers in rates, terms, and conditions of access; and (b) is equal to the access that the providing LEC gives itself.^{46/} The Commission reasoned that any standard that would allow a LEC to offer access inferior to that enjoyed by that LEC itself would be inconsistent with Congress's intention of establishing competitive,

^{45/}Notice, ¶ 193.

^{46/} *Local Competition Second Report and Order*, 11 FCC Rcd. 19392, 19444, ¶ 101 (1996). A "providing LEC" is a LEC that is required to permit nondiscriminatory access to its services pursuant to Section 251(b)(3). *See id.* at 19444, ¶ 101, n.244. The term "competing provider" refers to a provider of telephone exchange service or a provider of telephone toll service that seeks nondiscriminatory access from a providing LEC. *Id.*

deregulated markets for all telecommunications services.^{47/}

Therefore, if the LEC is offering national or nonlocal DA and using the in-region listings of its own subscribers, all of those listings must be provided to requesting DA providers under the same rates, terms and conditions that the LEC gives itself and its affiliates. In the recent “*National Directory Assistance Order*,” the Commission ordered U S WEST, as a condition of its forbearance to provide NDA services, to make available to unaffiliated entities all of the in-region telephone numbers it uses to provide regionwide DA service at the same rates, terms, and conditions it imputes to itself.^{48/} Metro One believes that Section 251(b)(3) requires the same conclusion and should be applied to all LECs providing NDA. All LECs should be allowed to impute only the incremental costs of providing the listing plus a reasonable allocation of common costs and overheads.

All data that a LEC has obtained as a result of its position as the dominant telephone provider in its region or otherwise, such as data acquired from independent LECs and CLECs operating in a LEC’s region, also must be provided to competitive providers. When a telephone subscriber establishes service and elects to have its name, address, telephone and main business heading, if appropriate, available on DA, the subscriber expects its information to be available universally in all relevant DA databases. This clearly would include the DA databases of competitive DA providers. If any independent LECs or CLECs have not given their permission for the LEC to provide their listings to competitive providers, the LEC itself should not be able to use the listings. If the independent LECs and CLECs want their listings available for any DA, they must make their listings available to all DA providers. ILECs should only be

^{47/} *Id.* at 19445.

^{48/} *See National Directory Assistance Order*, ¶ 37.

able to use independent LEC and CLEC listings that they have made available to competitive DA providers.

By their aggressive entrance into the NDA markets, LECs have also clearly demonstrated that they intend to compete aggressively with all other DA providers. However, LECs have not demonstrated any willingness to compete on a level playing field. LECs have consistently resisted, or even refused, to make their DA listings available to competing providers of DA. When they have made their listings available, they have done so only at rates many times higher than their costs. The Commission should take this opportunity to rectify these anticompetitive actions.^{49/}


III. CONCLUSION

WHEREFORE, for the foregoing reasons, Metro One respectfully requests that the Commission take such actions as are consistent with these Comments and further the pro-competitive goals of the 1996 Act by ensuring that competitive DA providers and Internet directory providers have access to SLI on nondiscriminatory terms and conditions, pursuant to the statutory language and intent of the 1996 Act.

^{49/} There is no need to require the LECs to make available the listings they obtain from third party data providers if the data is available to all DA providers under similar terms and conditions.

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